It is said that the municipality must be granted a wide discretion in deciding what is a public health measure. This is indeed true regarding the city's authority to enact the measure. It does not follow that its immunity from liability for admitted negligence is to be measured with equal liberality. To extend it thus is to bring it in conflict with the plain rule of policy that this principle of immunity, which countenances a wrong without a remedy, should be confined strictly to its established limits.

The difference, if any, between a municipal summer camp and a city park, is a difference of degree. While possibly the former is more truly connected with the welfare of the state at large than the latter,[20] in any event it marks the extreme limit to which the doctrine of sovereign immunity should be carried.[21]

A. R. R.

PROPERTY: LANDLORD AND TENANT: RIGHTS OF LESSOR AGAINST THIRD PARTY PROMISING LESSEE TO PAY RENT TO THE LANDLORD.—The case of *Erickson* v. *Rhee et al*[1] presented an interesting and important situation in the law of landlord and tenant. The landlord or lessor, Erickson, demised the premises to the lessee, Rhee, for three years. The latter then entered into an agreement with Siller Bros. in which it was provided that Rhee was to plant and harvest a crop of rice on 87 acres of the land "in accordance with instructions of Siller Bros." who promised Rhee "to pay the owner of said land the sum of $3.34 per acre for each acre planted to rice and used in the cultivation thereof." Under such an arrangement what were Erickson's rights against Siller Bros.?

Were it possible to construe the transaction as constituting an assignment of the lease from the lessee to Siller Bros. there would be no difficulty in allowing the plaintiff landowner to proceed directly against the new tenant for his rent without going beyond principles uniformly accepted in the law of contracts and of landlord and tenant.[2] There seems no doubt, however, but that the Court was correct in finding that the situation was not one involving an assignment.[3] Whether the relation

[20] If all of the children of the congested districts of the state could have a yearly vacation in the country a noticeable effect upon the general public health might result.

[21] No mention has been made of the fact that a charge of three dollars and seventy-five cents a week was imposed in the principal case. This is more than nominal, but small enough to negative the idea that the camp was undertaken for profit. As indicated above, the only effect of a pecuniary charge upon the principle involved is to furnish evidence of the purpose with which the act was done. See supra, n. 15.

[1] (Dec. 12, 1918) 27 Cal. App. Dec. 832.

[2] Note 52, L. R. A. (N. S.) 968, 979; Cal. Civ. Code, § 822; Salisbury v. Shirley (1884) 66 Cal. 223, 5 Pac. 104.

[3] Tiffany, Landlord and Tenant, § 151.

created was one of sub-tenancy, as found by the court, is doubtful but unimportant, for the important fact was Siller Bros. promise to pay rent. Starting with the assumption that the relation was one of lessor and sub-lessee a real difficulty arises, for "there is no privity of estate between the sub-tenant and the lessor, and as there is no privity of contract, the former is not liable to the latter for rent."[4] The early cases found the difficulty insuperable, and even though the sub-lessee made an express covenant to pay rent to the landlord the latter had no right of action on the promise.[5] Such, too, is the law in many jurisdictions today.[6] It is evident, therefore, that if recovery may be had that it must be on broad principles in no way peculiar to the law of landlord and tenant.

The court finally rests the case on what has really proved to be the solution in many jurisdictions—the doctrine of a third party's right to sue on a contract made for his benefit. This doctrine is recognized in California,[7] though "there is probably as much confusion in the judicial holdings in respect to the matter as on any question of law that can be mentioned." The doctrine has been applied so as to permit an action by a creditor against one who has agreed with a debtor to assume the debt;[8] against the grantee of a mortgagor by the mortgagee;[9] against the grantee of any property who agreed to assume debts of his grantor as part of the purchase price;[10] and in several cases a sub-tenant who promised to pay rent to the landowner has been held liable to an action by the owner on the same broad doctrine.[11] Some states have narrowed the application of the principle slightly,[12] but the general tendency has been to extend it. In California the principle has been applied in favor of a manufacturer against a sub-vendee on a promise not to sell below a minimum price;[13] of a broker on mutual promises between persons exchanging land to pay a commission to the broker;[14] of the holder of a note against the vendee of corporate stock from

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[4] Id. §§ 162, 181 (d); 52 L. R. A. (N. S.) 968, 976 n.; Ann. Cas. 1916E, 788, 823.

[5] Derby v. Taylor (1801) 1 East. 502, 102 Eng. Rep. R. 193.

[6] 16 R. C. L. 881, § 385. Right of action depends on existence of doctrine of third party's right to sue on a contract.

[7] Cal. Civ. Code, § 1559.

[8] See notes, 25 L. R. A. 257-280; 2 L. R. A. (N. S.) 783.

[9] Enos v. Sanger (1897) 96 Wis. 150, 70 N. W. 1069, 37 L. R. A. 862; McDonald v. Finseth (1915) 32 N. D. 400, 155 N. W. 863; Cockrell v. Poe (Wash., 1918) 171 Pac. 522.

[10] Montgomery v. Dorn (1914) 25 Cal. App. 666, 145 Pac. 148.

[11] Brewer v. Dyer (1851) 7 Cush. 337; Borell v. Newell (1870) 3 Daly (N. Y.) 233 (this is only a superior court decision); Foucar v. Holberg (1908) 85 Ark. 59, 107 S. W. 172.

[12] Massachusetts has perhaps retracted to some extent the doctrine of Brewer v. Dyer in its broadest sense, Dunlap v. Bullard (1881) 131 Mass. 161.

[13] Ghirardelli Co. v. Hunsicker (1912) 164 Cal. 355, 128 Pac. 1041.

[14] Lundeen v. Nowlin (1912) 20 Cal. App. 415, 129 Pac. 474.

the maker of the note, the promise to pay being part of the consideration;[15] and of a creditor of a mining corporation against a vendee of the latter that assumed its debts.[16] Section 1559 of the Civil Code by its terms does not apply where an agreement is not made expressly for the benefit of a party, and the Supreme Court has held that the rule does not apply if a party would be merely incidentally benefited were the agreement carried out.[17] Just where the line is to be drawn between third parties for whose benefit a contract is expressly made and third parties but incidentally benefited, is a difficult question to settle. In fact the cases are rare, except in instances of express trusts, where the purpose of the parties is not to benefit themselves. The third party is usually brought in only as a means of settling accounts between the immediate parties. Although the California Supreme Court in a well known case refused recovery by a third party on a contract which he claimed was made for his benefit,[18] on the ground that there was as to plaintiff only an incidental benefit, on a second appeal of the same case the Court did allow recovery on the theory of a trust.[19] The principal case seems to have presented the question of the lessor and tenant in this state for the first time. In such a case, however, there would seem to be no question but that the contract is expressly for the lessor's benefit when the sub-lessee or promisor, as in the principal case, promises expressly to pay rent to the landlord.

The finding of the court in favor of plaintiff accords with one's sense of justice and seems to do no violence to section 1559 of the Civil Code. It has behind it, too, decisions of other states which accept the doctrine of contracts for a third party's benefit. A great number, however, do not accept the doctrine and in such states the landowner, of course, has no action.[20] There is undoubtedly some objection from a strictly logical point of view in allowing a contractual action where in a technical sense no privity exists, but as a practical proposition and as a matter of justice why should the promisor complain about carrying out his agreement? The principal case seems to reach a desirable result without violating fixed rules of law when viewed from the point of view of a contract for the benefit of a third party.

In several of the states statutes have been passed for the protection of the landowner in cases like that presented in the

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[15] Montgomery v. Dorn, supra, n. 17.

[16] Washer v. Independent Mining Co. (1904) 142 Cal. 702, 76 Pac. 654.

[17] Chung Kee v. Davidson (1887) 73 Cal. 522, 15 Pac. 100.

[18] Supra, n. 17.

[19] (1894) 102 Cal. 188, 36 Pac. 519.

[20] Supra, n. 15.

principal case. Thus statutes provide that he shall have a lien upon the crops grown on the land by any party in possession.[21]

D. J. W.

PROPERTY: ADVERSE POSSESSION: ADMISSION OF TITLE IN ANOTHER.—In the recent case of *Mills v. Laing*,[1] the court was of the opinion that one of the essential elements necessary to create an effective title by adverse possession, namely "hostile" possession, was lacking and accordingly that the defendant had not acquired such a title to the land in controversy.

It is elementary that the term "hostile possession" does not contain any idea of animus or ill will toward any one.[2] It merely means exclusive possession; possession plus a claim of right which the claimant asserts is subordinate to no other claim.[3] It was contended in the principal case, and the contention was upheld by the court, that the defendant by saying that title was in another, had admitted that she was holding under that other. But does that necessarily follow? In a large percentage of cases of adverse possession, the claimant knows that title is in another, though he does not always know who that other is. In many cases of ouster, it is self-evident that the disseisor knows that the disseisee has a better legal right to the land than he has. Yet does this prevent him from acquiring the land by adverse possession? The very essence of the idea of adverse possession is that the claimant, while he may recognize that the legal title is in another (though this is not necessary) still holds the land as his own and in opposition, but not subordinate, to the title to which his possession is alleged to be adverse.[4] Of course, the moment the claimant admits that he holds the land as tenant of another, or as licensee of another, or by his permission, or in any way subject to another's title, his claim is no longer adverse to that other; he is then simply holding the land under the other party, as his tenant, licensee, or by his permission.[5] And in such a case the statute cannot run in his favor against the one whom the claimant admits he is holding under. As the court said in the principal case, any evidence of the recognition of the title of another is always admissible to show the real character of the possession.[6] And even if a declaration be made by the claimant after the statutory period has expired, such declaration may be admissible as bearing on

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[21] Alabama, Arkansas and Iowa are among the states allowing a lien on the crops regardless of who is in possession. See note, Ann. Cas. 1916E, 826.

[1] 27 Cal. App. Dec. 717.

[2] Ballard v. Hansen (1892) 33 Neb. 861, 51 N. W. 295.

[3] Long v. Mast (1849) 11 Pa. St. 189.

[4] Supra, n. 3.

[5] Angell, Limitations, § 384.

[6] Dillon v. Center (1886) 68 Cal. 561, 10 Pac. 176.